Nos. 13963, 14031, 14032, 14033, 14034

United States
COURT OF APPEALS
for the Ninth Circuit

LEE GWAIN TOY and LEE GWAIN DOK, by their Father and Next Friend, LEE BEN KOON,
Appellants,

vs.

DEAN G. ACHESON, Secretary of State of the United States,
Appellee.

REPLY BRIEF OF APPELLANTS

Appeal from the United States District Court for the District of Oregon.

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INDEX

TABLE OF CASES

STATUTES

Page

RULES

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REPLY BRIEF OF APPELLANTS

Appeal from the United States District Court for the District of Oregon.

The appeals in this case and consolidated cases Nos. 13963, 14031, 14032, 14033, and 14034 are based upon Section 503 of the Nationality Act of 1940 (8 U.S.C.A. §903), involving the rights of the appellants to enter the United States from a foreign country and have said rights determined by a Federal Court pursuant to the provisions thereof, including Chinese born in China

whose fathers are citizens and nationals of the United States.

These appeals were grounded upon four specifications of error as set forth in appellants' brief, to-wit:

Specifications No. 1, 2, 3 and 4.

Appellee now concedes that all of said specifications of error are correct and unchallenged excepting only specification number two (Appellee's Brief, page 4). We quote from page four of appellee's brief as follows:

> "The issues set forth in specifications 1, 3 and 4 have been disposed of in cases decided subsequent to the orders of dismissal entered in the within causes and the correctness of these specifications of error is admitted."

The foregoing concession by appellee is no doubt the result of the decisions of this Court and others rendered since the filing of these appeals, viz.

Acheson vs. Furosho, 212 Fed. (2d) 284.
Fong Wone Jing vs. Dulles, 217 Fed. (2d) 138.
Brownell vs. Lee Mon Hong, 217 Fed. (2d) 143.
Chow Sing vs. Brownell, 217 Fed. (2d) 140.
Lee Wing Hong vs. Dulles (7th Circ.), 214 Fed. (2d) 753.

The one and only specification of error challenged by appellee is set forth on page four of appellee's brief and is as follows:

> "That the trial Court erred in dismissing the within cause on the ground that the Department of State, through its Consulate Officer has never denied appellant's application for entry into the United States."

In appellee's statement of the case, page three thereof avers:

> "That defendant filed its answer to plaintiff's complaint and for lack of information denied all of the allegations contained in the foregoing paragraphs VII and VIII."

Paragraph IV of appellee's answer is as follows:

> "Answering Paragraphs IV, V, VI, VII, VIII, IX and X; defendant lacks information as to the truth or falsity of the allegations therein contained, and therefore, denies the same and puts plaintiff to proof thereon."

Where the facts are within the defendant's own knowledge or are accessible to him by consulting his records a sham denial of "no knowledge, information or belief" is not filed in good faith, is palpably untrue, is frivolous and insufficient to raise any genuine issue of fact.

Rule 8 (b) of the Federal Rule of Civil Procedure 28 U.S.C.A. Sub-section (d), also Subsection (b) thereof.

Oregon Mesabi Corp. vs. Johnson Lumber Corp., 166 Fed. (2d) 997, 1001 (CA 9, 1947), Cert. Den. 334 U.S. 837.

Lloyd Sabaubo Societa Anonime Per Azioni vs. Elting 47 Fed. (2d) 315.

Refusal to discluse or admit administrative repection of a claim of United States nationality defeats the statutory remedy.

Obviously the appellee, Secretary of State, may not disclaim knowledge or information as to whether his own subordinate, the Consul General at Hong Kong,

had filed with him appellants' applications for travel documents or passports, had conducted preliminary hearings of appellants or had refused and denied said appellants' applications.

As heretofore mentioned and alleged in appellee's answer, he puts us to proof of these matters which up to the present time appellants have been denied the privilege of so doing.

QUESTIONS PRESENTED IN APPELLEE'S BRIEF (Page 5)

(a) Is it necessary under § 503 of the Nationality Act of 1940, (§ 903, Title 8, USC) to allege that a right or privilege as a National of the United States was claimed and that right or privilege was denied by Department or Agency or Executive Official there of upon the ground that appellants were not Nationals of the United States.

ARGUMENT

Appellants submit they have fully covered this matter in their opening brief. The District Court's Order of Dismissal in this and consolidated cases (excepting Lee Wing Gue et al. vs. Acheson, No. 14032) Tr. page 17 with regard to denial states:

> "1. That the application as made to the American Consulate Officer of the Department of State by plaintiffs to permit plaintiff's entry into the United States has never been denied plaintiffs."

In case No. 14032, Lee Wing Gue et al. vs. Acheson, above referred to, the order dismissing this case makes

no mention that the complaint was dismissed for the reason that plaintiff was never denied a right or privilege of a United States national but in fact was dismissed on the three grounds that appellee has heretofore conceded as being incorrect.

Judge James Alger Fee, in his memorandum opinion regarding all of these cases (Tr. page 15) dismissed these cases on the sole ground that substitution of defendant Dulles for Acheson could not be made regardless of timely motions having been made, viz:

> "In view of the fact that substitution cannot be made the Court dismisses each of these cases."

Nowhere in the order dismissing these complaints (Tr. page 11) or the Court's written memorandum opinion (Tr. page 14) is it mentioned that the denial of the passport or travel document as alleged by facts contained in appellants' complaint, was denied on the ground and for the reason that appellants were not nationals.

Appellee does not contend that appellants failed to claim a right or privilege and a reading of Paragraph VI of appellants' complaint and similar allegations made in all consolidated cases plainly states that plaintiffs have alleged that they are citizens and *claim a right to enter the United States as nationals and/or citizens.* Appellants allege in Paragraphs VII and VIII that there has been *refusal* and *denial* by the Consul of their *rights* as American citizens and set forth the *facts* supporting the refusal and denial. Appellants also allege in Paragraph X of their complaint that they claim U. S. nationality

and citizenship in good faith and on a substantial basis. All appellants, in their complaints, claim deritive citizenship under Section 1993 of the Revised Statutes 8 USC 6 First Edition.

Counsel for appellee cites as authority the case of Dulles vs. Lee Gnan Lung, 212 Fed. (2) 73 as being similar to this action and consolidated causes. In the case there was no allegation in the complaint that Lung had *claimed* a *right* or privilege as a national of the United States *nor* did it allege that Lung had been *denied* a right or privilege. Appellee also cites the case of Fong Wone Jing vs. Dulles, 217 Fed. (2) 138. In that case the Court held that the District Court had jurisdiction to entertain the complaint which was tried on the facts as alleged. Appellee also cites Elizarrarez vs. Brownell, 217 Fed. (2d) 829. In that case the complaint contained *no* allegation that plaintiff was denied any right or privilege as a national and consequently did not state a cause of action. Appellee also cites Clark vs. Inouye, 175 Fed. (2d) 740. In this case there were no facts pleaded to show a denial had been made by the Consul and only conclusions of law were alleged. Appellee also cites the case of Lee Hung, Lee Siu and Lee Jam vs. Acheson, 103 Fed. Supp. 35. In those cases plaintiffs did not allege a claim as citizens or that a denial was made. This case came up on motions to dismiss before trial and the Appellant Court gave plaintiffs the opportunity to amend.

It is appellants' contention that under the facts as alleged in the complaint there is a justiciable issue pres-

ent, according to the facts as alleged in appellants' complaint, and that the failure of the Consul to act upon appellants' application amounts to a denial of appellants' rights on the ground that they are not nationals. In Wong Ark Kit vs. Dulles, 127 Fed. Supp. 871 decided January 26, 1955 by the United States District Court, District of Massachusetts the petitioner had applied for United States passport and the United States Consul requested appearance of petitioner's mother to testify as to his nationality. The Consul was informed that the mother could not be produced and the Consul refused to conclude the case. The court held that it was an implied denial of petitioner's passport and petitioner could bring his action declaring him to be a national of the United States.

In the case of Ow Yeon Yung vs. Dulles decided December 4, 1953 by the United States District Court N.D. California S.D. 116 Fed. Supp. 766 the plaintiff testified at his trial that his application for passport had been filed with the Consul and that he had answered their questions at the hearing to the best of his ability. The records of the Consulate Office introduced into evidence at the trial showed that the passport had been refused because plaintiff failed to sufficiently identify himself as the son of an American citizen. Defendant contended that an individual invoking (8 U. S. C. A. Sec. 903) must be denied some right or privilege as a national of the United States *upon the ground that he was not a national of the United States.* The court, in its holdings said:

> "In the case of Wong Wing Foo vs. McGrath (9th Circ. 196 Fed. (2) 120, 122) that this type of action

need not follow any administrative proceedings but could be instituted where an administrative agency such as the Department of State *refuses to give a passport* or refuses to allow a person claiming American citizenship to come to the country."

The court further said:

"That the defendant cites the case of Fong Nai Sun vs. Dulles, DC SD 117 Fed. Supp. 391, to show that the denial of the travel document may be based on grounds other than that the applicant is not a national. The court in that case said that the refusal by the Consul to issue the passport to the applicant was not based on the ground that he was not a national where the applicant failed to supply all the information required, i.e. an identifying witness. In this case there was a lack of essential part of the evidence necessary to make a finding as to nationality."

The court further said:

"That the instant case is distinguished from this above mentioned case in that the Consul had all the prerequisite information required for the issuance of a passport, therefore, the Consul's finding that the proof afforded by plaintiff was insufficient is in effect a finding that the applicant was not a national. As a result, plaintiff was denied a right or privilege on the ground that he was not a national of the United States."

In the case of Quong Ngeung vs. Dulles, U. S. Dist. Court SD New York, 117 Fed. (2d) 498 the complaint alleged that plaintiff had applied for travel documents as a citizen of the United States and that said documents had been refused. Under these set of facts the court stated that there was cause of action against the Secretary of State for declaratory judgment that plaintiff was a

citizen of the United States. This case cited U. S. Federal Rules of Civil Procedure, Rule 12 (b) 6, 28 USCA. The court in passing said:

> "This complaint is different than those in Lee Hung et al. vs. Acheson, 103 Fed. Supp. 35, 37 because in that case the complaint stated that the visa was denied *for reasons unknown to plaintiff*. In the case at bar it clearly states that plaintiff applied for travel documents, as a citizen, which was *refused*. Thus, the instant case is unlike the Lee Hung vs. Acheson and pleads a claim against the Secretary of State sufficient to survive the attack. Whether that claim can be proven is a matter that must await trial."

Counsel for appellee in their brief mentioned that it would be impossible for the Consul to act on appellants' applications before the effective date of the Immigration and Nationality Act of 1952. That there is nothing in the law to prohibit the Department from acting upon each of these cases since the complaints were filed by appellants in 1952. Counsel for appellee on page 16 of their brief state:

> "It has been reported that there were at least 1800 applications pending before the Consul prior to the effective date of the 1952 Nationality Act, and surely it was a physical impossibility to have acted upon all applications before the new act became operative."

This language seems to submit to the court matters of expediency. Since when have matters of expediency become parmount to the legal rights of the appellants? It is submitted that the Consul had from six months to five years to act in these cases. That to this date, no action has been taken on appellants' applications with

the exception of one, to-wit: Lee Wing Gue, No. 14032, in which case the Consul has made an official denial by way of a letter to the applicant and a letter to his attorney which were received by appellants' attorney after Judge Fee's order dismissing this case copies of which letters are set forth in a special appendix attached hereto. That it is the earnest desire of the said appellant that this Court consider said rights in this particular case.

Counsel for appellee cites a number of cases to point out that a passport is not evidence of citizenship and appellants have no quarrel with this proposition and fail to see wherein this contention has anything to do with these cases.

Counsel for appellee on page 16 of their brief cite the case of Ling Share Yee vs. Acheson, 214 Fed. (2d) 4, as being in point with their contention that the consul was not dilatory in his actions and therefore it did not amount to a denial. In that particular case, the consul withheld travel documents pending the plaintiff submitting further evidence which was not done by the plaintiff and, of course, it was reasonable to assume that the plaintiff could not claim denial for failure of the consul to act when in fact there was something to be done by the plaintiff. In appellants' cases all applicants filed with the consul their applicantions for passport in order to come to the United States to have their claims for citizenship determined but since the time of their filing of their said applications and hearings with the consul, the consul has refused and neglected to recognize, in any particular, said appellants' applications ex-

cept as cited above in the case of Lee Wing Gue, No. 14032, one of the appellants.

Appellee states in this brief that he has "no quarrel" with appellants' citations and contentions made in appellants' brief to the sufficiency of complaints under challenge by motions to dismiss. Appellants contend by virtue of said decisions that these cases should be remanded to the District Court for trial.

If counsel for appellee's contention is tenable why did he consent to a removal of the case of Woo Chin Chew et al. vs. Acheson, No. 14030, from this court to the District Court for further proceedings?

> "(b) The following cases consolidated herein brought by the father (or brother) and/or the next friend of said appellants were not brought in accordance with Rule 17 (c) of the Federal Rules of Civil Procedure in that appellants were not minors and the complaints do not contain any allegation of incompetence."

ARGUMENT

Appellee has failed to point out the facts to this Court that in the case of Chin Chuck Ming and Chin Chuck Sang et al. vs. Dulles, No. 13963, appellant Chin Chuck Ming was born on January 13, 1933 and his action was filed December 22, 1952 and that in the case of Lee Gwain Toy and Lee Gwain Dok et al. vs. Acheson, No. 14033, the entitled appellants herein were minors at the time of filing their complaint herein, Lee Gwain Toy being born on March 14, 1934 and Lee Gwain Dok being born December 12, 1932 and their action having been filed December 19, 1952.

Appellants contend that this question is not one of jurisdiction, and that the filing of actions by next friend does not in and of itself deny the court the power of jurisdiction to determine factual issues. Has not the court the authority to disregard and exclude "next friend"? The necessary allegations pertaining to the son, if proven on trial thereof, can determine their rights as citizens. This contention of appellee should have been raised, if at all, upon motion to dismiss in the District Court.

> "Objections that plaintiff is not the real party in interest must be made with reasonable promptness."
>
> Clark vs. Chase National Bank of City of New York, 45 Fed. Supp. 820.

> "Misjoinder of parties does not authorize dismissal of an action but such parties may be dropped out at any stage of the proceedings."
>
> F. X. Hooper Co. v. Langstan, 56 Fed. Supp 577.

> "Misjoinder of parties is not a ground for dismissal of an action. Parties may be dropped or added by order of the court upon motion of any party or of its own initiative at any stage of the action and on such terms as are just."
>
> Rule 21, Rules of Civil Procedure.

> "Under the rule, misjoinder of plaintiffs is not a ground for dismissal, and therefore not a defense."
>
> Macloud vs. Cohen Co., 28 Fed. Supp. 103.

> "Misjoinder is no longer a ground for dismissal."
>
> Vante vs. United States, 7 FDR 705 and 51 Fed. Supp. 500.

CONCLUSION

Appellants restate that they have met all requirements of Section 503 of the Nationality Act of 1940, 8

U.S.C.A. Sec. 903 and that the District Court has jurisdiction to try the issues and determine appellants' claims for United States national status and have substantially compiled with Rule 17(c) Federal Rules of Civil Procedure.

Can it be said that the Consul did not deny appellants' applications on the ground that they are not nationals of the United States when it appears from the complaints that the appellants' applications were filed with the Consul from five months to five years with preliminary hearings had before the Consul and since that time the Consul has remained mute? How long should appellants be required to wait for action by the Consul? Certainly it can be said that the Consul, if they intended to act upon appellants' applications, would or should have acted by now. It leads one to no other conclusion but that appellants' applications have been abandoned and there is no other way to protect their rights as American citizens than to have their case tried upon the facts and merits presented in their complaints before the District Court for the District of Oregon.

It is respectfully submitted that under the statute and pleadings herein, appellants are entitled to their day in court and reversal of the District Court's order dismissing these cases is in order.

Respectfully submitted

Rodney W. Banks,
Joseph & Powers,
Attorneys of appellants.

APPENDIX

THE FOREIGN SERVICE
OF THE
UNITED STATES OF AMERICA

American Consulate General
Hong Kong, April 14, 1953

Lee Wing Gue,
91 Wing Lok Street,
2nd Floor,
Hong Kong.

Dear Sir:

With reference to this office's letter of February 20, 1953, please be advised that a communication has been received from the Department of State informing this office that your passport application has been disapproved.

Very truly yours,

For the Consul General:
JOHN A. MCVICKAR,
American Vice Consul

Address Official Communications to
THE SECRETARY OF STATE
Washington 25, D. C.

DEPARTMENT OF STATE

Washington

In reply refer to
F130-Lee Wing Gue

Banks and Banks,
1208 Public Service Building,
Portland 4, Oregon.

My dear Mr. Banks:

In reply to your letter of April 22, 1953, you are informed that the passport application executed at the American Consulate General in Hong Kong on July 30, 1951 by Lee Wing Gue was disapproved by the Department of State because the applicant was unable to establish his identity. The material enclosed with your letter is of little value in determining the question of identity since it appears to have been created after Lee Sun Yue decided to bring his alleged fourth son to this country. You are further informed that the file in this case has been forwarded to the United States Attorney in connection with Civil Action No. 6752.

Sincerely yours,

R. B. SHIPLEY,
Director, Passport Office.